53D GRADUATE COURSE

EXPERT TESTIMONY & EXPERT ASSISTANCE

I. FRE/MRE FRAMEWORK FOR EXPERT TESTIMONY

A. Rule 702

Rule 702. Testimony by experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

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1. Trial judges decide preliminary questions concerning the relevance, propriety and necessity of expert testimony, the qualification of expert witnesses, and the admissibility of his or her testimony. *See* MRE 104(a).

2. In *United States v. Houser*, 36 M.J. 392 (1993) the CAAF set out six factors that a judge should use to determine the admissibility of expert testimony. Although *Houser* is a pre-*Daubert* case, it is consistent with *Daubert*, and the CAAF continues to follow it. *See United States v. Griffin*, 50 M.J. 278, 284 (1999). They are:

   a) Qualified Expert. To give expert testimony, a witness must qualify as an expert by virtue of his or her "knowledge, skill, experience, training, or education." *See* MRE 702

   b) Proper Subject Matter. Expert testimony is appropriate if it would be "helpful" to the trier of fact. It is essential if the trier of fact could not otherwise be expected to understand the issues and rationally resolve them. *See* MRE 702.

   c) Proper Basis. The expert's opinion may be based on admissible evidence "perceived by or made known to the expert at or before the hearing" or inadmissible hearsay if it is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject. . . ." The expert's opinion must have an adequate factual basis and cannot be simply a bare opinion. *See* MRE 702 and 703.

   d) Relevant. Expert Testimony must be relevant. *See* MRE 402.

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e) Reliable. The expert's methodology and conclusions must be reliable. *See* MRE 702.

f) Probative Value. The probative value of the expert's opinion, and the information comprising the basis of the opinion must not be substantially outweighed any unfair prejudice that could result from the expert's testimony. *See* MRE 403.

3. The Expert's Qualification To Form an Opinion.

Rule 702. Testimony by experts

. . . a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

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a) Knowledge, Training, and Education Foundation

(1) Show degrees attained from educational institutions;

(2) Show other specialized training in the field;

(3) Show the witness is licensed to practice in the field and has done so (if applicable) for a long period of time;

(4) Show teaching experience in the field;

(5) Show the witness' publications;

(6) Show membership in professional organizations, honors or prizes received, previous expert testimony.

b) Skill and Experience Foundation. An expert due to specialized knowledge. *See, United States v. Mustafa*, 22 M.J. 165 (C.M.A.).

(1) Example: *United States v. Meeks*, 35 M.J. 64 (C.M.A. 1992): Involved testimony by FBI agent concerning his "crime scene analysis" of a double homicide. Testimony included observations that killer was an "organized individual" who had planned and spent some time in preparation for crime, was familiar with crime scene and victims, and acted alone. Such evidence was not too speculative for admission under MRE 702.

(2) *United States v. Banks*, 36 M.J. 150 (C.M.A. 1992). Military judge erred when he refused to allow defense clinical psychologist to testify about the relevance of specific measurements for a normal prepubertal vagina, solely because the psychologist was not a medical doctor. As the court noted, testimony from a qualified expert, not proffered as a medical doctor, would have assisted the panel in understanding the government's evidence.

(3) *United States v. Harris*, 46 M.J. 221 (1997). Military Judge did not err in qualifying a highway patrolman who investigated over 1500 accidents, as an expert in accident reconstruction.

(4) *United States v. McElhaney*, 54 M.J. 120 (2000). During the sentencing phase, the government called an expert on future dangerousness of the accused. The expert said he could not diagnose the accused because he had not interviewed him nor had he reviewed his medical records. In spite of this and objections by defense counsel, the expert did testify about pedophilia and made a strong inference that the accused was a pedophile who had little hope of rehabilitation. The CAAF held that it was error for the judge to admit this evidence. Citing *Houser*, the court noted that the expert lacked the proper foundation for this testimony, as noted by his own statements that he could not perform a diagnosis because of his lack of contact with the accused.

(5) *United States v. Billings*, 58 M.J. 861 (Army Ct. Crim. App. 2003). To link the appellant to a stolen (and never recovered) Cartier Tank Francaise watch, the Government called a local jeweler as an expert witness in Cartier watch identification to testify that a watch the appellant was wearing in a photograph had similar characteristics as a Tank Francaise watch. Although the jeweler had never actually seen a Tank Francaise watch, his twenty-five years of experience and general familiarity with the characteristics of Cartier watches qualified him as a technical expert.

4. Proper Subject Matter ("Will Assist")

a) Helpfulness. Expert testimony is admissible if it will assist the fact finder. There are two primary ways an expert's testimony may assist.

(1) Complex Testimony. Experts can explain complex matters such as scientific evidence or extremely technical information that the fact finders could not understand without expert assistance.

(2) Unusual Applications. Experts can also help explain apparently ordinary evidence that may have unusual applications. Without the expert's assistance, the fact finders may misinterpret the evidence. *See, United States v. Rivers*, 49 M.J. 434 (1998); *United States v. Brown*, 49 M.J. 448 (1998).

(a) *United States v. Hall*, 165 F.3d 1095 (7th Cir. 1999). 7th Circuit held that trial judge did not abuse his discretion in excluding the defense expert on eyewitness identification. Even if the evidence meets the reliability prong of *Daubert*, it must also meet the helpfulness prong. Here the judge properly ruled that such testimony is not beyond the ken of lay jurors and there was no need for expert opinion testimony.

(b) *United States v. Dimberio*, 52 M.J. 550 (A.F. Ct. Crim. App. 1999). Military judge excluded the testimony of defense expert who would testify about the alcoholism, and mental problems of the accused's wife. Air Force court affirmed and held that this evidence was irrelevant because there was no link to these problems and her alleged violence. Testimony was impermissible profile evidence.

b) Form of the Opinion. The foundation consists of no more than determining that the witness has formed an opinion, and of what that opinion consists.

B. MRE 704.

Rule 704. Opinion on Ultimate Issue

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

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1. The current standard is whether the testimony assists the trier of fact, not whether it embraces an "ultimate issue" so as to usurp the panel's function. At the same time, ultimate-issue opinion testimony is not automatically admissible. Opinion must be relevant and helpful as determined through Rules 401-403 and 702.

   a) *United States v. Hill-Dunning*, 26 M.J. 260 (C.M.A.), *cert. denied*, 488 U.S. 967 (1988) (psychiatrist is competent to testify as to diagnosis of client and may testify that diagnosis is based upon assumption that what client said is the truth; yet, same witness may not testify that it is his opinion that what client said is truthful.)

   b) *United States v. Lipscomb*, 14 F.3d 1236 (7th Cir. 1994) (conclusion of law enforcement experts held qualified to opine that circumstances and behavior indicated intent to distribute drugs was not a legal conclusion as to a specific intent element).

   c) In *United States v. Diaz*, 59 M.J. 79 (2003), the CAAF held that it was improper for an expert to testify that the death of appellant's child was a homicide and that the appellant was the perpetrator, when the cause of death and identify of the perpetrator were the primary issues at trial.

2. One recurring problem is that expert should not opine that a certain witness's rendition of events is believable or not. *See, e.g., United States v. Petersen*, 24 M.J. 283, 284 (C.M.A. 1987) ("We are skeptical about whether any witness could be qualified to opine as to the credibility of another.") The expert may not become a "human lie detector." *United States v. Palmer*, 33 M.J. 7, 12 (C.M.A. 1991).

   a) Questions such as whether the expert believes the victim was raped, or whether the victim is telling the truth when she claimed to have been raped (i.e. was the witness truthful?) are impermissible.

   b) However, the expert **may** opine that a victim's testimony or history is consistent with what the expert's examination found, and whether the behavior at issue is **typical** of victims of such crimes. Focus on symptoms, not conclusions concerning veracity. *See United States v. Birdsall*, 47 M.J. 404 (1998) (expert's focus should be on whether children exhibit behavior and symptoms consistent with abuse; reversible error to allow social worker and doctor to testify that the child-victims were telling the truth and were the victims of sexual abuse).

c) Questions such as whether the victim's behavior is consistent with individuals who have been raped, or whether injuries are consistent with a child who has been battered, however, are permissible.

d) Examples: An expert may testify as to what symptoms are found among children who have suffered sexual abuse and whether the child-witness has exhibited these symptoms. *United States v. Harrison*, 31 M.J. 330, 332 (C.M.A. 1990).

(1) *United States v. Cacy*, 43 M.J. 214 (1995): Accused charged with sodomy and indecent liberties on six-year-old daughter. Expert testimony that child's behavior is consistent with behavior patterns of a typical sexual abuse victim and that victim did not appear rehearsed admissible. However, testimony that expert explained to child importance of being truthful and, based on child's responses, recommended further treatment, was an affirmation that expert believed the victim, which improperly usurped the responsibility of the fact-finder

(2) *United States v. Marrie*, 43 M.J. 35 (1995): Government expert testified that preteen and teenage boys (the victims) were the least likely group to report abuse because of shame and embarrassment and fear of being labeled a homosexual. She opined that false allegations from that group were "extremely rare" and outside of her clinical experience. Such testimony was improperly admitted, although harmless.

(3) *United States v. Raya*, 45 M.J. 251 (1996). Social worker's testimony that rape victim was not vindictive and wanted to stay away from the accused was not improper comment on credibility.

(4) *United States v. Anderson*, 50 M.J. 447 (1999), Accused charged with child sexual abuse. On appeal for the first time defense objected to testimony of government expert on child abuse accommodation syndrome. Defense claimed that it amounted to labeling the accused as an abuser and vouching for the credibility of the victims because the expert got all her information form the victims. CAAF rejected that argument and noted that the expert testimony was limited to factors and that the facts of this case were consistent with those factors

(5) *But see United States v. Schlamer*, 47 M.J. 670 (N.M.Ct. Crim.App. 1997), *affirmed*, 52 M.J. 80 (1999). On redirect examination TC asked one of the accused's interrogators if he believed the accused was making the confession up. The court said the question was permissible because investigator was an eye-witness to the confession, the witness gave a conclusory answer that added nothing, and the accused had two doctors testify that the confession was unreliable, so the government should have the chance to rebut with an eye witness. And, if this was error, it was harmless.

(6) *United States v. Eggan*, 51 M.J. 159 (1999). Accused convicted of forcible sodomy with another soldier. Defense theory was that it was consensual. The victim sought counseling after the incident and the government called the counselor in as an expert witness. The defense asked the expert if the victim could be faking his emotions. The expert said it was possible. On re-direct the expert testified that he saw no evidence of faking. On appeal defense claimed that this opinion was error because he was commenting on the witness' credibility. CAAF rejected this argument noting that the defense opened the door to this line of questioning, did not object at trial.

(7) *United States v. Armstrong*, 53 M.J. 76 (2000). Accused charged with indecent acts with his daughter. Accused made a partial confession to the police and at trial stated that any contact with his daughters was not of a sexual nature. On rebuttal the govt. called an expert in child abuse who testified that in her opinion the victim suffered abuse at the hands of her father. The defense did not object. On appeal CAAF held error and reversed the case. The court noted that error was not constitutional. None the less, the court held that the error had a substantial influence on the findings and reversed.

(8) *United States v. Robbins*, 52 M.J. 455 (2000). Accused charged with two specifications of sodomy with a child under 16**.** Social worker testified that in this case, the allegation was substantiated. A second witness also testified, about what the victim told here. She testified that when the victim reported the incident to her, the victim appeared not to be lying. The defense did not object to any of this evidence. CAAF cited *Birdsall* and then distinguished this case primarily because it was a judge

alone case and since the judge is presumed to know and apply the law correctly, these errors were not plain error and no relief.

C. MRE 703

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703. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert, at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

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1. The language of the rule is broad enough to allow three types of bases: facts personally observed by the expert; facts posed in a hypothetical question; and hearsay reports from third parties. *United States v. Reveles*, 42 M.J. 388 (1995), expert testimony must be based on the facts of the case.

2. Hypothetical questions (no longer required). No need to assume facts in evidence, but, if used, must be reasonable in light of the evidence. *United States v. Breuer*, 14 M.J. 723 (A.F.C.M.R. 1982).

   a) The proponent may specify historical facts for the expert to assume as true, or may have the expert assume the truth of another witness or witnesses.

   b) Personal Perception. *United States v. Hammond*, 17 M.J. 218 (C.M.A. 1984). The fact that expert did not interview or counsel victim did not render expert unqualified to arrive at an opinion concerning rape trauma syndrome. *United States v. Snodgrass*, 22 M.J. 866 (A.C.M.R. 1986*); United States v. Raya*, 45 M.J. 251 (1996). Defense objected to social worker's opinion that victim was exhibiting symptoms consistent with rape trauma accommodation syndrome and suffered from PTSD on basis that opinion was based solely on observing victim in court, reading reports of others and assuming facts as alleged by victim were true. Objection went to weight to be given expert opinion, not admissibility. The foundational elements include:

      (1) Where and when the witness observed the fact;

      (2) Who was present;

      (3) How the witness observed the fact;

      (4) A description of the observed fact.

c) Facts presented out-of-court (non-record facts), if "of a type reasonably relied upon by experts in the particular field" (even if inadmissible).

(1) "The rationale in favor of admissibility of expert testimony based on hearsay is that the expert is fully capable of judging for himself what is, or is not, a reliable basis for his opinion. This relates directly to one of the functions of the expert witness, namely to lend his special expertise to the issue before him." *United States v. Sims*, 514 F.2d 147, 149 (9th Cir.), *cert. denied*, 423 U.S. 845 (1975).

(2) There is a potential problem of smuggling in otherwise inadmissible evidence.

(a) *United States v. Neeley*, 25 M.J. 105 (C.M.A. 1987), *cert. denied*, 484 U.S. 1011 (1988). Psychiatrist's testimony that she consulted with other psychologists in reaching her conclusion that accused had inflated results of psychiatric tests and her opinion was the consensus among these people was hearsay and inadmissible. Military judge may conduct a 403 balancing to determine if the probative value of this foundation evidence is outweighed by unfair prejudice.

(b) *United States v. Hartford*, 50 M.J. 402 (1999). Defense was not allowed to cross-examine the government expert about contrary opinions from two colleges. The defense did not call the two as witnesses and there was no evidence that the government expert relied on the opinions of these colleges. The CAAF held the MJ did not err in excluding this questioning as impermissible smuggling under MRE 703.

(3) The elements of the foundation for this basis include:

(a) The source of the third party report;

(b) The facts or data in the report;

(c) If the facts are inadmissible, a showing that they are nonetheless of the type reasonably relied upon by experts in the particular field.

D. Relevance. Expert testimony, like any other testimony must be relevant to an issue at trial. *See* MRE 401, 402; *Daubert, v. Merrell Dow Pharmaceuticals, Inc*. 509 U.S. 579 (1993).

E. Reliability.

1. The Test for Scientific Evidence. In *Daubert v. Merrell Dow Pharmaceuticals Inc*., 509 U.S. 579 (1993), the Supreme Court held that nothing in the Federal Rules indicates that "general acceptance" is a precondition to admission of scientific evidence. The rules assign the task to the judge to ensure that expert testimony rests on a reliable basis and is relevant. The judge assesses the principles and methodologies of such evidence pursuant to MRE 104(a).

a) The role of the judge as a "gatekeeper" leads to a determination of whether the evidence is based on a methodology that is "scientific," and therefore reliable. The judgment is made before the evidence is admitted, and entails "a preliminary assessment of whether the reasoning or methodology is scientifically valid." Trial court possessed with broad discretion in admitting expert testimony; rulings tested only for abuse of discretion. *General Electric Co. v. Joiner*, 118 S. Ct. 512 (1997). *See also United States v. Kaspers*, 47 M.J. 176 (1997).

b) Factors. The Supreme Court discussed a nonexclusive list of factors to consider in admitting scientific evidence, which included the *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) test as a separate consideration:

(1) whether the theory or technique can be and has been tested;

(2) whether the theory or technique has been subjected to peer review and publication;

(3) whether the known or potential rate of error is acceptable;

(4) whether the theory/technique enjoys widespread acceptance.

c) After *Daubert*, "helpfulness" alone will not guarantee admission of evidence because it does not guarantee "reliability."

(1) Examples:

(a) DNA Testing. *United States v. Thomas*, 43 M.J. 626 (A.F.Ct. Crim. App. 1995), one Air Force appellate judge held that the military judge did not abuse his discretion in admitting DNA results obtained by PCR methodology. Judge properly applied *Daubert* factors and any weaknesses in PCR methodology go to weight not admissibility.

(b) Luminol Testing. *United States v. Hill*, 41 M.J. 596 (Army Ct. Crim. App. 1994), luminol tests satisfy the *Daubert* criteria where testimony is limited to an opinion that positive results only show a presumptive positive for blood. *See also, United States v. Holt*, 46 M.J. 853 (N.M.Ct. Crim. App. 1997), *United States v. Schlamer*, 47 M.J. 670 (N.M.Ct. Crim.App. 1997)

(c) Chemical Hair Analysis. *United States v. Nimmer*, 43 M.J. 252 (1995), case remanded in order to allow the lower court to apply the *Daubert* model to RIA and GC/MS testing for the presence of cocaine. *See also, United States v. Bush*, 44 M.J. 646 (A.F.Ct. Crim. App. 1996), military judge did not abuse his discretion in applying *Daubert* factors and permitting analysis of the accused's hair to go before the members.

2. Non-Scientific Evidence. Several years ago, the Supreme Court resolved whether the judge's gatekeeping function and the *Daubert* factors apply to non-scientific evidence. In *Kumho Tire v. Carmichael*, 119 S. Ct. 1167 (1999), the Court held that the trial judge's gatekeeping responsibility applies to all types of expert evidence. The Court also held that to the extent the *Daubert* factors apply, they can be used to evaluate the reliability of this evidence. Finally, the Court ruled that factors other than those announced in *Daubert* can also be used to evaluate the reliability of non-scientific expert evidence.

a) *United States v. Brown* 49 M.J. 448 (1998). MJ Judge excluded the testimony of defense expert in eyewitness identification on 403 grounds. Army court said this per se denial was an abuse of

discretion but harmless. CAAF reviewed and affirmed. CAAF did not address the correctness of that part of the Army court's decision. Nor did CAAF illuminate how *Daubert* factors applied to this kind of expert testimony. The court did not announce any per se rule on the admissibility of this type of expert testimony. *See also, United States v. Rivers*, 49 M.J. 434 (1998).

b) *United States v. Mustafa*, 22 M.J. 165 (C.M.A.), *cert. denied*, 479 U.S. 953 (1986). In this pre-*Daubert* case involving blood-spatter evidence, the court used a three-step analysis. First, does the evidence involve an area of specialized knowledge? Second, would the expert testimony be relevant (helpful) to the trier of fact? Third, is the expert qualified to testify? After *Kumho Tire*, this minimal inquiry may not be sufficient. The trial judge should do more than consider the expert's qualifications in making the reliability determination.

c) Other Factors. Other factors courts have considered to evaluate the reliability of scientific and non-scientific testimony include:

(1) Was the information developed for the purpose of litigation?

(2) Did the expert unjustifiably extrapolate facts to support conclusions?

(3) Are there alternative explanations?

(4) Is the expert being as careful as they would be in their regular professional work outside paid litigation?

(5) Is there a well-accepted body of learning in this area?

(6) How much practical experience does the expert have and is there a close fit between the experience and the testimony?

(7) Is the testimony based on objective observations and standards?

F. Matters for Experts.

1. Drug Testing.

a) In *United States v. Campbell*, 50 M.J. 154 (1999), the defense claimed that the lab's use of GC/MS/MS to determine the existence of LSD in urine failed under *Daubert*. CAAF reversed the case because the government failed to show that the 200 PG/ML established by DoD adequately accounted for innocent ingestion.

b) On reconsideration, the CAAF clarified its opinion in *Campbell*, at 52 M.J. 386 (2000). In a urinalysis case, the government can show wrongful use by expert testimony that meets this 3-part test: (1) proof must show that the metabolite is not naturally produced by the body; (2) cutoff level and concentration are high enough to reasonably discount innocent ingestion; (3) testing method reliably detected and quantified the concentration. The 3-part test is not required if the evidence can explain, with equivalent persuasiveness, the underlying scientific methodology and significance of test results.

c) In *United States v. Green*, 55 M.J. 76 (2001), the CAAF held that a positive urinalysis, accompanied by the testimony of an expert witness interpreting the result, was sufficient to support the permissive inference of knowing and wrongful use of cocaine.

2. Sleep Disorders. *United States v. Blaney*, 50 M.J. 533 (A.F. Ct. Crim. App. 1999). Accused charged with sodomizing another male victim while the victim was asleep. Defense wanted to admit the testimony of two experts to testify about the victim's alleged sleep disorders. Military judge excluded the testimony and the Air Force Court affirmed. Court held that under *Daubert*, the expert's methodologies were unreliable and not helpful because the victim had not been interviewed.

3. False Confessions. *United States v. Griffin*, 50 M.J. 278 (1999), CAAF held that MJ did not abuse his discretion in excluding the testimony of an expert in false confessions. The court reasoned that no witness could serve as a human lie detector, and in this case the evidence was unreliable because there was no correlation between the expert's studies and the accused in this case. In the future, no per se exclusion, may be admissible if testimony is limited to factors and there is a close correlation between the study group and the accused at trial.

4. Child Abuse Accommodation Syndrome. *United States v. Suarez*, 35 M.J. 374 (C.M.A. 1992): In trial for child sex abuse crimes, evidence was received on how the victim exhibited "Child Sexual Abuse Accommodation Syndrome" (children change or recant their stories, delay or fail to report abuse, accommodate themselves to the abuse). While such

evidence is controversial, it may be admitted where it explains the abused child's delay or recantation, as was the case here. *United States v. Cacy*, 43 M.J. 214 (1995).

5. Dysfunctional Family Profile Evidence.

a) *United States v. Banks*, 36 M.J. 150 (1992). Error to present expert testimony that accused's family in a situation as ripe for child sexual abuse, purporting to present characteristics of a family that included child sexual abuser, then pursuing a deductive scheme of reasoning that families with the profile present an increased risk of child sexual abuse and that Bank's family fit the profile.

b) *United States v. Pagel*, 45 M.J. 64 (1996). No abuse of discretion in allowing government expert to testify concerning a dysfunctional family "profile" and whether the accused's family displayed any of its characteristics. Testimony went to support credibility of daughter's accusations and to explain her admitted unusual behavior. Unlike in *Banks* evidence used to explain the behavior of the victim on the assumption she was abused by someone, not necessarily the accused. Using "profile' evidence to explain the counter-intuitive behavioral characteristics of sexual abuse victims was permissible.

6. Rape Trauma Syndrome. Rape Trauma is a subcategory of PTSD in the DSM-IV. The psychiatric community recognizes it as valid and reliable. Evidence may assist fact-finder by providing knowledge concerning victim's reaction to assault. *United States v. Carter*, 26 M.J. 428 (C.M.A. 1988) (Rape trauma syndrome evidence will assist the trier of fact in determining the issue of consent. This would be particularly true where such members would likely have little or no experience with victims of rape. . . [The RTS evidence] serves as a helpful tool by providing the fact-finders with knowledge regarding a victim's psychological reactions to an alleged sexual assault.)

a) Other uses: RTS testimony to rebut an inference that a victim's conduct was inconsistent with a claim of rape where she did not fight off the attacker, made inconsistent statements concerning the assault, did not make a fresh complaint, and recounted the incident in a calm and "unnatural" manner. *See United States v. Cox*, 23 M.J. 808 (N.M.C.M.R. 1986), *United States v. Hartford*, 50 M.J. 402 (1999).

b) Impermissible Testimony. *United States v. Bostick*, 33 M.J. 849 (A.C.M.R. 1991). Psychologist impermissibly expressed an

opinion concerning the rape victim's credibility by discussing the performance of the victim on a "Rape Aftermath Symptoms Test," (RAST) and by stating that the victim did not fake or feign her condition. The expert thus became a "human lie detector." The RAST failed to meet the requirements for admissibility of scientific testimony (lack of foundation). Despite lack of defense objection, the court finds plain error and sets aside findings and sentence.

7. Handwriting Analysis. Two more district courts are following the trend to limit the expert's testimony to characteristics and prevent them from either testifying that a certain individual was the author of a questioned document or to their degree of certainty. *United States v. Ruthaford,* 104 F. Supp. 2d 1190 (Dist. of NE 2000); *United States v. Santillan*, 1999 U.S. Dist. Lexis 21611 (Northern Dist. of CA).

8. Hypnosis. Admissible if the military judge finds that the use of hypnosis was reasonably likely to result in recall compatible in accuracy to normal human memory. *United States v. Harrington*, 18 M.J. 797 (A.C.M.R. 1984*); Rock v. Arkansas*, 483 U.S. 44 (1987). Proponent must show by clear and convincing evidence satisfaction of the following procedural safeguards:

   a) Independent, experienced hypnotist conducted.

   b) Hypnotist not regularly employed by the parties.

   c) (c)Information revealed to the hypnotist is recorded.

   d) Detailed statement must be obtained from the witness in advance.

   e) Only hypnotist and subject present during session.

9. DNA. *United States v. Youngberg*, 43 M.J. 379 (1995) (evidence of DNA testing is admissible at courts-martial if proper foundation is laid. *United States v. Davis*, 40 F.3d 1069 (10th Cir), *cert. denied*, 115 S. Ct. 1387 (1995) (statistical probabilities are basic to DNA analysis and their use has been widely researched and discussed).

10. Psychological Autopsy.

   a) *United States v. St. Jean*, 45 M.J. 435 (1996). No error in allowing forensic psychologist to testify about suicide profiles and that his

"psychological autopsy" revealed it was unlikely the deceased committed suicide.

b) *United States v. Huberty*, 53 M.J. 369 (2000). Applying *Daubert* and *Kumho Tire* the CAAF affirmed the MJ's decision to exclude an experts opinion that the accused was not an exhibitionist. The court noted that there was no body of scientific knowledge to support the expert's claim that the MMPI could be used to conclude that an individual was not an exhibitionist and could not have committed a crime.

11. Eyewitness Identification.

a) *United States v. Garcia*, 44 M.J. 27, *cert. denied*, 117 S. Ct. 174 (1996). Abuse of discretion, though harmless, to limit testimony concerning the unreliability of eye witness identification by preventing testimony on the inverse relationship between confidence and accuracy in identifications and theories of memory transference and transposition.

b) *United States v. Brown* 49 MJ. 448, (1998). MJ Judge excluded the testimony of defense expert in eyewitness identification on 403 grounds. Army court said this per se denial was an abuse of discretion but harmless. CAAF reviewed and affirmed. CAAF did not address the correctness of that part of the Army courts decision. Nor did CAAF illuminate how *Daubert* factors applied to this kind of expert testimony. The court did not announce any per se rule on the admissibility of this type of expert testimony. *See also United States v. Rivers*, 49 M.J. 434 (1998).

c) *United States v. Hankey*, 203 F.3d 1160 (9th Cir. 2000). In this case the accused was charged with conspiracy and distribution of drugs. Accused was a member of a gang and a co-accused and other witnesses testified for the defense and denied any wrong doing. In rebuttal the government called a police officer to render an expert opinion that part of the gang affiliation code was not to testify against another gang member or suffer physical injury. Defense said that the witness's opinion was not reliable and more prejudicial than probative. 9th Circuit applying *Kumho* said the judge did not abuse his discretion in admitting this evidence.

d) *United States v. Smithers*, 212 F.3d 306 (6th Cir. 2000). Trial judge abused his discretion by excluding a defense expert on the weaknesses of eyewitness identification. The trial judge's comments that he wanted to "experiment" were indicative of the

abuse of his discretion, as was his failure to even conduct a *Daubert* type reliability hearing.

12. Future Dangerousness. *United States v. Latorree*, 53 M.J. 179 (2000). Accused pleaded guilty to sodomizing a 7-year old girl. In sentencing, the government expert testified, in response to both defense and government questioning, that during treatment most sexual offenders admit to other sexual assaults. On appeal, defense claimed it was error for the expert to provide this information. CAAF ruled that the expert evidence lacked relevance and failed the reliability standards as required by *Daubert*, but any error in admitting the testimony was harmless.

G. MRE 707

MRE 707. Polygraph Examinations.

(a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination shall not be admitted into evidence.

(b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

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1. The Past: From 1923 to 1987, the "Frye" test excluded polygraph evidence because it was not generally accepted within the scientific community. In 1987, the "Frye" test was overruled as the standard for admissibility for scientific evidence. *United States v. Gipson*, 24 M.J. 246 (C.M.A. 1987). From 1987-1991, polygraph evidence was not per se prohibited for use in courts-martial.

2. The Rule: In 1991, the President promulgated MRE 707 as a per se ban on all polygraph evidence in courts-martial - this included the results of an examination, the opinion of an examiner, any reference to an offer to take, the failure to take or the taking of a polygraph examination.

a) In 1996, CAAF held that the categorical ban on polygraph evidence is an impermissible infringement on the accused's 6th Amendment right to present a defense provided the accused testifies and had his credibility placed at issue. *United States v. Scheffer*, 44 M.J. 442 (1996).

b) The Supreme Court Speaks. In *United States v. Scheffer*, 523 U.S. 303 (1998), the Supreme Court overruled CAAF. In an 8 to 1 opinion the Court said that a per se exclusion on polygraph evidence does not unconstitutionally abridge the right of an accused to present a defense.

(1) Some unresolved issues:

(a) 4 members of the majority believe the ban is unwise and a more "compelling" case my lead to a different result.

(b) Per se ban is somewhat inconsistent with *Daubert*.

(c) No indication of what level of acceptance is required

(d) Dissent blasts the inconsistency of a vast DoD program that the government argues is unreliable

(e) Dissent points out that president my have violated Article 36 in the promulgation of the rule because there are no issues unique to the military. This issue was assumed by CAAF and not briefed to the Court.

3. *United States v. Light*, 48 M.J. 187 (1998). Accused was convicted of larceny for stealing govt. equipment. During the course of the investigation, he was giving a polygraph by CID which he failed. The polygraph failure was one issue that a Texas Justice of the Peace used to grant a search warrant of his civilian quarters. Issue, can polygraph results be considered to decide PC questions? Court noted but did not resolve the tension between these rules as to whether polygraph evidence can be considered.

4. *United States v. Clark*, 53 M.J. 280 (2000). Accused pleaded guilty to larceny and false official swearing. In his judge alone case, the stipulation of fact included information that the accused failed a polygraph test. The CAAF ruled that it was plain error for the military judge to admit this evidence, however, the error did not materially prejudice his rights. Therefore, no relief.

5. *United States v. Southwick*, 53 M.J. 412 (2000). Accused convicted of wrongful distribution of drugs. She sold the drugs to an informant. At trial, the defense attacked the credibility of the informant by trying to demonstrate that the Air Force had not done a proper certification of him. In response, the informant testified that he had been polygraphed before being accepted as an informant. The defense did not object to this evidence. The CAAF held it was harmless error for this evidence to come

before the fact finders, because the polygraph was not directly related to any issues at trial or the informant's in court testimony.

6. *United States v. Tanksley*, 54 M.J. 169 (2000). Buried on page seven of a nine-page statement to NIS agents, the accused stated that he refused to take a polygraph examination. The government offered the entire statement and the information about his refusal to take a polygraph was not redacted. The defense did not object. The CAAF ruled that any passing reference to a polygraph examination did not materially prejudice the accused.

7. *Unites States v. Morris*, 47 M.J. 695 (N.M.Ct. Crim. App. 1997). In this case the accused was convicted of false official statements and battery for sexually forcing himself on a female friend. The accused was questioned and he initially claimed the contact was consensual. Then, in a pre-polygraph interview he admitted that the contact was not consensual. The polygraph was never conducted. The MJ prohibited the accused from introducing evidence that the investigators never actually gave him a polygraph. Judge struck the right balance required by MRE 707 by admitting the statement and the circumstances surrounding the statement but not allowing any evidence about an offer to take or the taking of a polygraph to be admitted.

H. MRE 403 Test

1. The probative value of the evidence must outweigh other considerations under MRE 403. *See, United States v. Houser*, 36 M.J. 392 (1993).

2. Determination. Proper application of the five other factors set forth in *Houser*, will ensure that the probative value is not outweighed by other concerns.

II. EXPERT WITNESS REQUESTS

A. A request for expert consultation/assistance is different than a request for an expert witness. *United States v. Langston*, 32 M.J. 894 (A.F.C.M.R. 1991).

B. What Gives the Defense the Right to Ask?

1. Sixth Amendment. In all criminal prosecutions, the accused shall enjoy the right to have compulsory process for obtaining witnesses.

2. UCMJ, art. 46. Defense counsel shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe.

3. R.C.M. 703(a). The defense shall have equal opportunity to obtain witnesses and evidence.

C. How Should the Defense Do It?

1. Government Employees.

a) R.C.M. 703(c)(2)(A) - the defense shall submit a written list of requested witnesses to the trial counsel.

b) R.C.M. 703(c)(2)(B) - contents of the request shall include the witness's name, telephone number, if known, and address or location such that the witness could be found upon exercise of due diligence AND a synopsis of expected testimony sufficient to show relevance and necessity.

2. Civilian Experts. Add the following:

R.C.M. 703(d). When employment of an expert is considered necessary by a party, the party shall, in advance of employment of the expert, and with notice to the opposing party, submit a request to the convening authority to authorize the employment and fix compensation of the expert. The request shall include a complete statement of the reasons why employment of the expert is necessary and the estimated cost of employment. A request denied by the convening authority may be renewed before the military judge who shall determine whether the testimony of the expert is relevant and necessary and, if so, whether the Government has provided or will provide an adequate substitute. *United States v. Ndanyi*, 45 M.J. 315 (1996).

D. Analyzing the Requests. Determine if the factors set out in *United States v. Houser*, 36 M.J. (1993), have been met. See discussion above.

1. *Adequate Substitute*. If the defense shows that the proposed expert testimony would be relevant, and the principles and methodologies used in reaching her conclusions are reliable, who is the defense entitled to get?

a) The defense may not select the expert of its choice and bind the government to pay for her. *United States v. Hagen*, 25 M.J. 78 (C.M.A. 1987), *cert. denied*, 108 S. Ct. 1015 (1988).

b) But the government bears the burden of demonstrating that it can provide an adequate substitute (typically a government employee). To qualify as an "adequate substitute," the person must be one with **similar professional qualifications** and who **can testify to the same conclusions and opinions** as the defense requested expert. *United States v. Guitard*, 28 M.J. 952, 955 (N.M.C.M.R. 1989).

c) A government expert whose views diverge from those of the defense expert is not an adequate substitute. *United States v. Robinson*, 24 M.J. 649, 652 (N.M.C.M.R. 1987); *United States v. Van Horn*, 26 M.J. 434 (C.M.A. 1988).

III. EXPERT ASSISTANCE

A. An accused is entitled to investigative or other expert assistance *when necessary* to prepare an adequate defense. *United States v. Mustafa*, 22 M.J. 165 (C.M.A. 1986), *cert. denied*, 479 U.S. 953 (1986).

1. The key to a successful defense demonstration of necessity is a plausible showing that the expert could provide information that the defense and its staff would not be able to obtain on their own. *United States v. Gonzalez*, 39 M.J. 459, 461 (1994) citing *United States v. Allen*, 31 M.J. 572, 623 (N.M.C.M.R.), *aff'd*, 33 M.J. 209 (C.M.A. 1991); *United States v. True*, 28 M.J. 1057 (N.M.C.M.R. 1989).

2. The burden is on the defense to establish why assistance is needed, what the assistance would accomplish and why detailed counsel and staff could not perform the work themselves. *United States v. Garries*, 22 M.J. 288 (C.M.A. 1986), *cert. denied*, 479 U.S. 985 (1986). *See also United States v. McAllister*, 55 M.J. 270 (2001).

3. An accused is not entitled to assistance simply by noting that the prosecution has employed expert assistance in preparation of its case. *United States v. Washington*, 46 M.J. 477 (1997). An accused is not automatically entitled to an expert of equal qualifications without a showing of necessity. *United States v. Anderson*, 47 M.J. 576 (N.M.Ct. Crim. App. 1997). If an accused procures expert witness at his own expense, any error from arising from the Government's failure to provide an expert becomes moot. *United States v. Gunkle*, 55 M.J 26 (2001).

4. While equal protection, the UCMJ and the MCM assure servicemembers entitlement to expert assistance, the accused must demonstrate the necessity of such services by showing that the expert would be of some value **and** denial would result in a fundamentally unfair trial. *United*

States v. Robinson, 39 M.J. 88 (C.M.A. 1994). This showing of necessity presumes that defense counsel will try to educate themselves to attain competence for defending the relevant issues in the case. *United States v. Thomas*, 41 M.J. 873 (N.M. Ct. Crim. App. 1995). *See also United States v. Kreutzer*, 59 M.J. 773 (Army Ct. Crim. App. 2004) (holding that military judge abused his discretion in denying a defense request for a mitigation expert in a capital case, where the defendant's state of mind was central to the case)

5. Defense counsel should be prepared to at least answer the following questions:

a) What have you done to educate yourself in the requested area of expertise?

b) What experts and government employees having knowledge in this area have you interviewed? If none, why not?

c) If the issue in question involves a laboratory analysis by CID or the FBI, have you requested the opportunity (using TDS funding) to visit the crime lab and to examine the procedures and quality control standards utilized within the laboratory in this or any other case? If so, what did you learn from the visit?

d) What do you need to learn that you still do not understand in order to defend the accused in this case?

e) What treatises have you examined?

f) Are there experts other than the one you requested who would meet your needs? Have you talked to them? Would providing a government employee as an expert consultant meet your needs? Why not?

g) How many cases have you tried which involved the issues in this case? As to military counsel with little or no experience -

(1) Have you requested that the SDC or RDC detail another defense counsel with greater familiarity in the area of expertise needed to defend the accused? Have you advised the accused of his right to request an IMC who has a greater familiarity in this area?

(2) Have you requested through TDS channels any resource materials in this area, if not already readily available from local sources?

(3) Have you requested through TDS channels that CID or other Army organizations provide you and other counsel training in this area?

(4) If your area of expertise is common to many cases in your jurisdiction, why have no such requests been previously made?

h) What is the nature of any confidential communication you wish to protect? What need, if any, would there be for your client and the expert to talk with each other?

i) As an alternative, could the defense need be met by the Court's appointment of an expert under Mil. R. Evid. 706?

j) Have you asked the convening authority to employ an expert for you?

B. Type of Assistance. If assistance is "necessary," to whom is the defense entitled?

1. A specific individual? - No.

a) When the defense requests an expert consultant, there is no right to demand that a particular individual be assigned. *United States v. Tornowski*, 29 M.J. 578 (A.F.C.M.R. 1989).

b) No right to choose consultant of own personal liking or receive funds to hire own. *Ake v. Oklahoma*, 470 U.S. 68 (1985).

2. A government employee? - Probably.

a) Usually, investigative, medical and other expert services are available in the military and are sufficient to permit the defense to adequately prepare for trial. *United States v. Garries*, 22 M.J. 288, 290-91 (C.M.A. 1986).

b) If the accused successfully demonstrates need, he must accept military investigative services and cannot compel the Government to fund such civilian services, if an offer is made under a Mil. R.

Evid. 502 order of confidentiality. *United States v. True*, 28 M.J. 1057, 1061 (N.M.C.M.R. 1989).

3. Civilian Assistance? - Unlikely.

a) Only in very unusual circumstances, where the government within its own resources cannot provide investigative services sufficient to enable the defense to prepare adequately for trial, will it be required to fund such services. The test is whether any of the government offered consultants is sufficient to enable the defense *after doing their own research* to adequately prepare for trial. Sole reliance on the advice of experts is no substitute for the hard work required to obtain the knowledge necessary to prepare a client's case for trial. *True*, 28 M.J. at 1061-2.

b) Absent a showing by the accused that his case is unusual or the experts proffered by the government are unqualified, incompetent, partial or unavailable, the investigative, medical, and other expert services available in the military are sufficient to permit the accused to adequately prepare for trial. *United States v. Ndanyi*, 45 M.J. 315, 319 (1996).

c) Defense counsel must make efforts to use expert assistants made available by the Government. In *United States v. Short*, 50 M.J. 370 (1999), the accused was charged with wrongful use. Defense counsel requested an independent expert from outside the Government to assist with trial preparation. The government offered the services of a Navy laboratory employee. CAAF held that defense counsel failed to make an adequate showing of necessity in her motion to compel production of a civilian expert when she had not even talked to the government expert and refused to do so, did not seek help from more experienced counsel, and was successful on cross-examination eliciting testimony that she claimed she needed the help of an expert to obtain.

4. Competent Assistance? – Yes. In *United States v. McAllister*, 55 M.J 270 (2001), the accused was charged with murdering his ex-girlfriend. The convening authority granted the accused's request for a specific defense consultant on DNA evidence, Dr. Patrick Conneally. Dr. Conneally examined the evidence, determined that an expert in Polymerase Chain Reaction (PCR) testing was needed, and recommended employment of a PCR expert, Dr. Blake. Dr. Conneally did not have this expertise. At a motions hearing, the defense requested substitution of Dr. Blake as an expert witness on PCR. The military judge denied the request, as did the convening authority. Because DNA evidence—and particularly PCR

testing—was the lynchpin of the Government's case, it was error for the military judge to deny the defense request to substitute experts. CAAF set aside the findings and remanded the case to ACCA.

C. *Ex Parte* Hearings. There is no absolute right to an *ex parte* hearing to demonstrate the need for expert assistance at government expense. The military judge does not abuse his discretion when requiring a preliminary showing of necessity on the record. *United States v. Kaspers*, 47 M.J. 176 (1997). *See also United States v. Ruppel*, 45 M.J. 578 (A.F. Ct. Crim. App. 1997).

D. Confidentiality. MRE 502 [Lawyer-Client Privilege] controls.

1. A toxicologist assigned to consult in preparation for a court-martial and to advise during trial is a lawyer's representative for purposes of Mil. R. Evid. 502. *United States v. Turner*, 28 M.J. 487 (C.M.A. 1989).

2. However, the privilege concerning use of the accused's mental examination does not apply to preclude disclosure of statements made if the defense counsel requests the sanity evaluation. *United States v. Toledo*, 26 M.J. 104 (C.M.A. 1988).

IV. CONCLUSION

APPENDIX

AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

A. Rule 103. Rulings on Evidence. (Effective 1 December 2000 in federal courts, Mil. R. Evid. effective date is 1 June 2002.)

103(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(2). Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which the questions were asked. Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

B. Rule 404 (a). Character Evidence Generally. (Effective 1 December 2000 in federal courts, Mil. R. Evid. effective date is 1 June 2002.)

Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: (1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution.

C. Rule 701. Opinion Testimony by Lay Witnesses. (Effective 1 December 2000 in federal courts, Mil. R. Evid. effective date is 1 June 2002.)

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.

D. Rule 702. Testimony by Experts. (Effective 1 December 2000 in federal courts, Mil. R. Evid. effective date is 1 June 2002.)

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, my testify thereto in the form of an opinion or otherwise, if (1) the testimony is the based upon sufficient facts or date, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

E. Rule 703. Bases of Opinion Testimony by Experts. (effective 1 December 2000 in federal courts, pending Mil. R. Evid. Effective date 1 June 2002).

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

F. Rule 803(6). Hearsay Exceptions; Authentication by Certification. (Effective 1 December 2000 in federal courts, Mil. R. Evid. effective date is 1 June 2002).

(6) Records of regularly conducted activity.—A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term ''business'' as used in this paragraph includes the armed forces, a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. Among those memoranda, reports, records, or data compilation normally admissible pursuant to this paragraph are enlistment papers, physical examination papers, outline-figure and fingerprint cards, forensic laboratory reports, chain of custody documents, morning reports and other personnel accountability documents, service records, officer and enlisted qualification records, logs, unit personnel diaries, individual equipment records, daily strength records of prisoners, and rosters of prisoners.

G. Rule 902(11-12). Self-Authentication. (Effective 1 December 2000 in federal courts, Mil. R. Evid. effective date is 1 June 2002.)

(11) Certified domestic records of regularly conducted activity.—The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record—

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
(B) was kept in the course of the regularly conducted activity; and
(C) was made by the regularly conducted activity as a regular practice. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

(12) Certified foreign records of regularly conducted activity.—In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible
under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record—

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
(B) was kept in the course of the regularly conducted activity; and
(C) was made by the regularly conducted activity as a regular practice. The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.